IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 16.03.2007

CORAM:

THE HON'BLE MR. JUSTICE S. MANIKUMAR

C.M.A.NO.197 of 2001

The Managing Director,
Tamil Nadu State Transport Corporation,
(VPM DVN.1), Ltd., Villupuram. … Appellant/Respondent

Cause title accepted vide as per
order of Court dt.10.8.2001
made in CMP 12328/01

Vs.

Dr.S.Rajendran … Respondent

The Civil Miscellaneous Appeal is filed under Section 173 of the Motor Vehicles Act against the judgment & Decree dated 08.02.2001 made in M.C.O.P.No.347 of 1999 on the file of the Motor Accidents Claims Tribunal, (Additional District Judge-cum-Chief Judicial Magistrate), Cuddalore.

For Appellant : Mrs.S.Geetha for Mr.R.Balakrishnan

For respondent : Mr.K.Venkataramani

JUDGMENT

Aggrieved by an order dated 08.02.2001 made in M.C.O.P.No.347 of 1999 on the file of the Motor Accidents Claims Tribunal, (Additional District Judge-cum-Chief Judicial Magistrate), Cuddalore, the Transport Corporation preferred this appeal.

2. Brief facts leading to the appeal are as follows: On 24.10.1996, at about 7.10 p.m., when the respondent/claimant was traveling in a bus, owned by the appellant-Transport Corporation, another bus bearing Registration No.TN-31-N-0552 came in the

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opposite direction at a high speed, dashed against the rear portion of the bus. As a result of which, the respondent/claimant sustained grievous injuries and multiple communited fractures in distal humerus with intera anticular extensions and fracture of Olecranon in his right hand. Immediately, he was rushed to the Government Hospital, Cuddalore and thereafter, he was referred to Krishna Hospital, Cuddalore. Again, he was treated in Bone and Joint Clinic, Chennai and underwent two surgeries during the period of treatment. He was an E.N.T.Professor and Head of the Department at Thanjavur Medical College. He claimed compensation of Rs.25,00,000/-.

3. The appellant-Transport Corporation resisted the claim petition and contended that on 24.10.1996, the driver of the appellant-Transport Corporation bus drove the vehicle carefully and cautiously. Another bus bearing Registration No.TN-31-N-0552 came in the opposite direction and while crossing the bus, the respondent/claimant stretched his hand outside the bus and sustained injuries. The driver of the bus was not responsible for the accident and it was purely the fault of the respondent/claimant, who kept his hand on the window sill. Therefore, the appellant-Transport Corporation contended that they are not liable to pay compensation.

4. Before the Tribunal, the respondent/claimant examined himself as PW.1. PW.2 is the Auditor of the respondent/claimant. PW.3 is the Manager and partner of Vijaya Poly Clinic, Thanjavur. PW.4 is the Doctor who examined the respondent/claimant with reference to the medical records. PW.5 is another Doctor. Exs.P1 to P155 were marked on behalf of the respondent/claimant. On behalf of the appellant-Transport Corporation, The driver of the offending vehicle was examined as RW.1 and no document was marked.

5. The Tribunal, on evaluation of pleadings and evidence, found that the driver of the appellant-Transport Corporation bus was responsible for the accident and awarded Rs.9,83,500/- with interest at the rate of 12% per annum.

6. Heard Mrs.S.Geetha for Mr.R.Balakrishnan, learned counsel for the appellant and Mr.R.Venkataramani, learned counsel for the respondent.

7. Learned counsel for the appellant submitted that the Tribunal failed to consider that it is the respondent/claimant, who invited the accident by projecting his hand outside the bus and except the respondent/claimant, no other passenger was injured in the accident.

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8. On the other hand, learned counsel for the respondent/claimant submitted that there should be sufficient gap between two buses, while crossing each other. In this case, the respondent/claimant was sitting in the back seat of the bus. When the bus bearing Registration No.TN-31-N-0552 came in the opposite direction and dashed against the rear portion of the appellant-Transport Corporation bus, the respondent/claimant sustained grievous injuries. He submitted that even if a passenger rests his hand on the window sill, it is the duty of the driver to see that there must be sufficient gap between the two vehicles while crossing each other.

9. In a decision in Sushma Mitra v. M.P.State Road Transport Corporation [1974 ACJ 87], the High of Madhya Pradesh has held as follows:

> "it cannot be disputed that the driver of a bus which carries passengers owes a duty of care for the safety of passengers. While driving he must have the passengers in contemplation and he must avoid acts or omissions which can reasonably be foreseen to injure them and in deciding what acts or omissions he should avoid, he must bear in mind the normal habits of passengers. It is a matter of common experience that passengers who sit adjoining a window very often rest their arm on the window-sill by which act the elbow projects outside the window. The driver of the bus must have these passengers also in contemplation and, therefore, while overtaking or crossing another vehicle on the road he must not come too close to the vehicle that is overtaken or crossed and he must leave sufficient gap between the vehicles to avoid injury to these passengers."

10. A Division Bench of this Court in Mrs.Sydney Victor v. Janab S.Kadar Sheriff [1974 ACJ 318] has held that,

> "It is true that putting out the hand or any other part of the body outside a fast-moving vehicle would be a negligent act, particularly if the vehicle is moving in a crowded place. In a busy city where there is heavy traffic, it would certainly be highly dangerous to put out the hand or arm or other part of the body so as to be projecting outside the moving vehicle. Even such putting out a part of the body outside the moving vehicle may not be an act which endangers the safety of the person concerned, if the vehicle was not moving in a crowded place but it was moving only in a broad highway, for in such a highway

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there is no reasonable possibility of any other vehicle coming very close to the vehicle in which the person is travelling. In any event, we are not in a position to hold that mere gripping of the window cross-bar in a position in which the right thumb was gripping the bar on its outer side would be a negligent act on the part of the injured, especially when the vehicle was on a broad highway and not moving in any crowded place. It cannot be said that PW.1 the injured, had acted negligent or without due care, merely by gripping the cross-bar of the window when the bus was going in a highroad."

11. A Division Bench of Kerala High Court in O.Mammachan v. Kerala State RTC & Anr., reported in II (1994) ACC 476, has considered the question as to whether the person who rests his arm in the window sill for the comfortable sitting can said to be attributed to the accident. In paragraph 7 of the judgment, it has held that,

"the driver of the bus owes a duty of care for the safety of passengers travelling in the bus. To achieve this object he has to look out for any possible obstruction on the road and to take reasonable steps to avoid obstruction without causing any injury to the passengers. While overtaking a moving vehicle or crossing another vehicle, the driver has to leave sufficient space in order to see that there was no likelihood of the passengers' arms being injured. He should have foreseen the possibility of passengers resting their elbows on the window-sill. In the process of crossing or overtaking another bus, he must not only avoid contact with the body of the bus but also avoid the elbow of any passenger resting on the window-sill coming into contact with the oncoming bus or the bus which he is overtaking. Precautions are therefore to be taken by him to leave sufficient gap for preventing any mishap."

12. In a decision in State of Punjab and Another v. Smt.Guranwanti, reported in AIR 1960 Punjab 490, the Punjab High Court has observed that it is well-known that often passengers travel with their elbow resting on the window of the car. There is no prohibition against it. It was further observed that the plaintiff at that time of the morning considering the state of traffic cannot be said to have failed to use reasonable care for his safety by resting his elbow on the window.

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13. In the instant case, RW.1, the driver of the bus, has deposed that on the date of accident, he was driving his vehicle carefully and cautiously, and the respondent/claimant was sleeping in the back seat by keeping his hand on the window sill. Another bus bearing Registration No.TN-31-0552 came in the opposite direction at a high speed, dashed against the rear portion of the bus, as a result of which, the respondent/claimant sustained grievous injuries.

14. Even assuming that the respondent/claimant has kept his arm on the window sill, the fact that two vehicles have crossed so close to each other, would prove that the buses were driven by its driver rashly and negligently without giving sufficient gap. It is the duty of the driver to drive cautiously while crossing the other vehicle. He should leave sufficient gap between the vehicles. The driver has not taken sufficient care to avoid the accident.

15. The Supreme Court in Municipal Corpn. of Greater Bombay v. Laxman Iyer reported in AIR 2003 SC 4182, in paragraph 6, it is held that,

> "Negligence is omission of duty caused either by an omission to do something which a reasonable man guided upon those considerations who ordinarily by reason of conduct of human affairs would do or obligated to, or by doing something which a prudent or reasonable man would not do. Negligence does not always mean absolute carelessness, but want of such a degree of a care as is required in particular circumstances. Negligence is failure to observe, for the protection of the interests of another person, the decree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. The idea of negligence and duty are strictly correlative. Negligence means either subjectively a careless state of mind, or objectively careless conduct. Negligence is not an absolute term, but is a relative one; it is rather a comparative term. No absolute standard can be fixed and no mathematically exact formula can be laid down by which negligence varies under different conditions and in determining whether negligence exists in a particular case, or whether a mere act or course of conduct amounts to negligence, all the attending and surrounding facts and circumstances have to be taken into account. It is absence of care according to circumstances. To determine whether an act would be or would not be

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negligent. It is relevant to determine if any reasonable man would foresee that the act would cause damage or not. The omission to do what the law obligate or even the failure to do anything in a manner, mode or method envisaged by law would equally and per se constitute negligence on the part of such person. If the answer is in the affirmative, it is a negligent act."

16. Under the circumstances, the argument of the leaned counsel for the appellant that there was contributory negligence on the part of the respondent/claimant is rejected. The findings of the Tribunal regarding negligence are based on evidence and also supported by the legal principles and therefore, it is confirmed.

17. As regards quantum of compensation, learned counsel for the appellant submitted that the Tribunal has erred in awarding Rs.3,08,000/- towards medical expenses, without any basis. She further submitted that the award of Rs.1,00,000/- towards future medical expenses is based on surmises. She also submitted that 60% disability assessed by the Doctor for the fracture in the shoulder and elbow is on the higher side. She submitted that the award of Rs.1,00,000/- towards pain and suffering is also on the higher side.

18. Per contra, learned counsel for the respondent/claimant submitted that the award towards medical expenses is supported by Ex.P4 to P95, which includes, details of treatment availed in the private hospital, prescriptions of Doctors and bills for purchase of medicines. Ex.P54 is the receipt issued by Bone and Joint Clinic Research Centre for the payment of Rs.1,06,500/-. Ex.P55 is the cash receipt issued by Vijaya Poly Clinic for the payment of Rs.84,000/-. Ex.P56 is the receipt issued by M.V.K.Nursing Home for the payment of Rs.14,500/-. Exs.P12 and P13 are the out-patient service records for the period from 21.01.1997 to 26.12.1999. Exs.P18 to P45 are the prescriptions and Exs.P57 to P95 are the bills for the purchase of medicines. The amount mentioned in each bill is more than Rs.2,000/-.

19. Admittedly, the respondent/claimant is a Professor and the head of the department of E.N.T., in Thanjavur Medical College. There are two fractures, one in the right elbow and other in the shoulder. Two surgeries were performed to fuse the fractured bones. It is evident from Ex.P11 that the respondent/claimant was treated as inpatient in Bone and joint Clinic, Chennai between 25.10.1996 and 18.11.1996. The treatment and the surgical procedure adopted by the hospital are extracted hereunder.

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"The emistus wound was washed with copiou silin extensive deberi was present and was washed out. There was a fracture of the capitellum with gross displacement. There was extensive communisoen of the lateral aspect of the distal humerous. The medial aspect was intact with only one fracture lime at the supra condylar level. There was also fracture of the Olecronan with damae to the orticular cartilage of the olecranon. The existing would was extended proximally and distally. The trian muscle was further split to expose the humerous. Initially the capitellum was reduced with the trocblea and and fixed with one 3.5mm cancellous screw. The supra condylar component was reduced and the fracture was stablised with a 8 hole 3.5mm DCP plate good stability was obtained. The lateral aspect was apromited but since there was extensive communisition fixation was not attempted. The olecranon was then reduced and fixed with 2 k-wire and tension band wire. Torien released wound closed in layers."

After discharge from the abovesaid hospital, the respondent/claimant had taken treatment in Vijaya Poly Clinic on 21.11.1996. Where, skin grafting was done on the same day under general Anesthesia. He was discharged from the said hospital on 18.12.1996. The above said details are evident from Ex.P14, Discharge summary issued by Vijaya Poly Clinic.

20. It is evident from Exs.P18 to P53 that the respondent/claimant was treated as outpatient in Thanjavur. Ex.P15 is the Discharge summary issued by M.K.V.Nursing Home for the period from 27.06.1997 to 29.06.1997. During the period of treatment, skin grafting was done on 27.06.1997. Exs.P97 to P127 are the receipts issued by Messrs. J.K.Travels, Thanjavur for transportation. All these documents prove that the respondent/claimant had taken continuous treatment ever since from the date of accident to set right the fractured bone as early as possible. The award of Rs.3,08,000/- towards medical expenses is supported by bills and therefore, the same is sustained.

21. PW.4, Doctor who has examined the respondent/claimant with reference to the medical records, has deposed that due to the fracture in the right elbow and shoulder, there is a reduction of movement by 25 Degrees. The right elbow of the respondent/claimant is projecting outside by 10 Degrees and it is bend. There is no movement in the right elbow and there is mal-union of bones. He has further deposed that the respondent/claimant finds it difficulty in performing Micro surgery and in using surgical instruments. He has also deposed

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that the implantation of plate has to be removed for which, the respondent/claimant may have to incur expenses to the tune of Rs.1,50,000/-. He has assessed the disability at 60% and issued Ex.P150, Disability certificate.

22. PW.3 is the Manager and partner in Vijaya Polyclinic, Thanjavur. He has deposed that the respondent/claimant used to conduct 10 to 15 surgeries in the hospital and after the accident, he could not perform any operation. He has further deposed that the respondent/claimant has to incur medical expenses for removing the plate, which was implanted earlier.

23. From the above evidence, it is clear that the respondent/claimant has to incur future medical expenses. Ex.P151 is the X-Ray taken by the respondent/claimant. Though the respondent/claimant as well as other witnesses have deposed that Rs.1,50,000/- is required for future medical expenses, the Tribunal has awarded only Rs.1,00,000/-. The said award is not excessive and the same is confirmed. But, the Tribunal has erred in awarding interest for future medical expenses.

24. In R.D.Hattangadi v. Pest Control (India) Pvt. Ltd., and [1995 ACJ 366], the Supreme Court has held in Paragraph 18, is as follows:

> "18. So far the direction of the High Court regarding payment of interest at the rate of percent over the total amount held to be payable to the appellant is concerned, it is to be modified. The High Court should be clarified that the interest shall not be payable over the amount direced to be paid to the appellant in respect of future expenditure under different heads. It need not be pointed out that interest is to be paid over the amount which has become payable on the date of award and not which is to be paid for expenditures to be incurred in future. As such we direct that appellant shall not be entitled to interest over such amount."

In view of the above principle, the award of Rs.1,00,000/- towards future medical expenses shall not carry any interest.

25. The Tribunal has awarded Rs.1,00,000/- towards pain and suffering. Initially the respondent/claimant was treated as inpatient in the Government Hospital, Cuddalore and thereafter, he was shifted to Krishna Hospital. The respondent/claimant had taken treatment in Bone and Joint Clinic between 25.10.1996 and 18.11.1996. During the period of treatment, K-wires were fixed to fuse the fractured bones. It is evident from Ex.P14, Discharge

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summary that the respondent/claimant was treated as inpatient between 21.11.1996 and 18.12.1996 in Vijaya Poly Clinic, Thanjavur. Ex.P14, Discharge summary shows that he was again treated as inpatient in M.V.K.Nursing Home between 27.06.1997 and 29.06.1997 . The nature of injuries are very severe. It is evident from the medical records that he had taken treatment in three different spells in various hospitals. He was also treated as outpatient for some time. Certainly, he would have experienced severe pain and suffering at the time of the accident, during he period of treatment and post-operative period. It is also evident from the records that the respondent/claimant had taken phsiotherophy for considerable period. Considering the length of the treatment and nature of injuries, it would be appropriate that a sum of Rs.50,000/- can be awarded for pain and suffering. Hence the award in respect of pain and suffering is restricted to Rs.50,000/-.

26. There is ample evidence to show that the respondent/claimant had been to Madras on several occasions, which is supported by the documents. It is evident from Exs.P12 and P13, Out-patient Service Records issued by Bone and Joint Clinic, Chennai that the respondent/claimant had attended regular check-ups twice a month at Chennai. He has produced Ex.P96 to P128, Trip Sheets issued by J.K.Travels, Thanjavur to substantiate the same. But the Tribunal has failed to award any amount towards transportation. This Court deems it fit to award Rs.25,000/- for transportation expenses.

27. PW.5, Dr.K.Subramanian, a private practitioner in E.N.T., has deposed that every month, he used to refer 5 to 10 patients to the respondent/claimant for treatment and surgery. Due to the injuries, the respondent/claimant finds it difficulty to do Micro surgery and therefore, he has stopped referring the patients to the respondent/claimant. The oral testimony of the respondent/claimant that he could not do micro surgery, is supported by the evidence of PW.4, Doctor, who has issued disability certificate and also by PW.5, E.N.T. Doctor. As a professor and the head of the department of E.N.T. and who had been performing operations regularly with his expertise, will have a feeling that he has lost his ability that he cannot compete with other professionals. A person not only suffers injury on account of the accident, but also suffers injury in mind and body throughout his life on account of the accident. A feeling will be developed in his mind that he has lost his ability to perform surgeries which leads to depression and agony, for the rest of his life. Therefore it would be appropriate that a sum of Rs.30,000/- can be awarded towards mental agony.

28. The oral testimony of the respondent/claimant that he was earning Rs.20,000/- per month, is not disputed. PW.2, Auditor

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has deposed that the respondent/claimant was getting Rs.10,000/- to 15,000/- per month as salary and was earning good income from his private practice. Exs.146 to 148 are the income-tax returns submitted by the respondent/claimant. He has further deposed that after the accident, the monthly income of the respondent/claimant derived from the private practice is considerably reduced to Rs.1,000/- and but for the disability, he would have earned Rs.30,000/- per month. The award of Rs.75,000/- towards loss of income from private practice is sustained.

29. There is no doubt that being a senior surgeon, the respondent/claimant would have earned atleast Rs.5,000/- for a surgery at the time of accident. Ex.P136 is a letter to prove that he has been called for an interview to the post of Dean of a Medical College and it supports the case of the respondent/claimant that he has possessed sufficient experience as Professor and Head of the Department. Though the learned counsel for the appellant argued that the award of Rs.3,00,000/- towards loss of earning is excessive, there is no specific ground raised in the memorandum of appeal. The overall evidence given by the Doctors, Auditor and the medical records produced, amply prove that there is a loss of future earning capacity due to the disability caused. Therefore, the award of Rs.3,00,000/- towards loss of earning capacity is confirmed.

30. In a decision in Cholan Roadways Corporation Ltd., v. Ahmed Thambi and 6 others [2006(3) LW 1025], the Full Bench of this Court has held that ,

> "In order to avoid any future confusion and to bring more clarity and transparency in the award of damages, it is necessary that the tribunal, while awarding damages, should itemise the award under each of the head namely, pecuniary losses and non-pecuniary losses. In the non-pecuniary losses the tribunal shall consider a) pain and suffering, b) loss of amenity, c) loss of expectation of life, hardship, mental stress, etc (d) loss of prospect of marriage and under the head pecuniary losses, the tribunal shall consider loss of earning capacity and loss of future earnings as one component apart from medical and other expenses and loss of earning, if any from the date of accident till the date of trial. When loss of earning capacity is compensated as also the non-pecuniary losses under (a) to (d), permanent disability need not be separately itemised."

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Following the decision of Full Bench, a sum of Rs.1,00,000/- towards disability compensation is liable to be deducted from the total award and the same is deducted.

31. In view of the above, the respondent/claimant is entitled to compensation of Rs.8,88,500/-, except for the award towards future medical expenses, there shall be an interest of 12% per annum on the quantum of compensation, from the date of claim till the date of realisation. The apportionment of the award is given below:

Medical expenses	: Rs.3,08,500/-
Future Medical expenses	: Rs.1,00,000/-
Pain and suffering	: Rs. 50,000/-
Transportation	: Rs. 25,000/-
Mental agony	: Rs. 30,000/-
Loss of Private practice	: Rs. 75,000/-
Earning capacity	: Rs.3,00,000/-
	Rs.8,88,500/-

The Tribunal is directed to refund the balance amount with proportionate accrued interest to the appellant-Transport Corporation, within a period of two months from the date of receipt of a copy of this order.

32. In the result, the Civil Miscellaneous Appeal is partly allowed. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1.The Motor Accidents Claims Tribunal,
(Additional District Judge-cum-Chief Judicial Magistrate),
Cuddalore.

2.The Record Keeper,
VR Section, High Court, Madras.

+1cc to Mr.K.Vankataramani, Advocate Sr 17099

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km/16.4.

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